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EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

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ONE of the most important rules of construction of statutes, constitutions and similar instruments seems to be the rule that the expression of one subject, object, or idea is the exclusion of other subjects, objects, or ideas. This rule is ordinarily used in law books in its latin form as given above in the title of this article. The writer of this article recently had occasion to collect the cases in Wisconsin where this rule had been applied by the Supreme Court, and because of the fact that it is almost impossible to find these cases in the Digests, the result of this labor is reproduced here for the benefit of those who may have occasion to use the rule in the future. The rule has been applied by the Supreme Court of Wisconsin to the state constitution, to the rule against perpetuities, to the power of the legislature, to powers of counties, to city charters, to the statute enumerating actions that survive, to the statute declaring marriages void, to the construction of private contracts, and to many other subjects as will be shown in this article.

So far as we have been able to find this rule of construction was first applied to the state Constitution in Wisconsin in the case of *State, ex rel. Crawford vs. Hastings*. 10 Wis. *525 at *531 (top of reprint 475). Judge Crawford, who was elected to the office of associate justice of The Supreme Court, applied to the secretary of state to have his salary for six months audited. He presented the

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audited salary warrant to the defendant, the state treasurer, who refused to make payment. One of the defenses was that Judge Cole had already collected the salary and the other defense was that the warrant had not been counter-signed by a new officer—the comptroller of the State. It is in connection with this second defense that the point of construction arose; the specific point being whether or not the legislature could create a second auditor when the constitution only mentioned one. The rule was applied, to the effect that as long as the constitution stated that the secretary of state was to audit the bills, that this expression excluded anyone else being authorized to audit the bills.

It was contended that as long as the legislature had not been *prohibited* from creating a second auditor, that the legislature had the right to do so. In other words, the defendant looked for prohibition in construing that clause of the State Constitution. The Court met the proposition squarely (middle of reprint 475, near the end of *531), as follows (after quoting the rule in Latin at the top of the page):

“Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person.”

The above case is an important one because in construing a State Constitution it would be second nature to look for prohibition in the constitution, the state being a sovereign, as distinguished from the created Federal Government in whose constitution we must look for grants of power rather than prohibition, but this rule of construction is so strong and was applied with such vigor here that the Court held that the expression that the secretary of state should be the auditor excluded the idea that anybody else could be an auditor. A positive delegation of power to one officer in a State Constitution was held to be a prohibition against delegating this same power to anyone else.

According to our research the rule was next applied to the Rule Against Perpetuities, in *Dodge vs. Williams*, 46 Wis. 70 at 96. That case points out that the English Rule Against Perpetuities applied to personalty as well as realty. The Wisconsin Statute, at that time, applied only to realty, and our Court very pointedly held that the expression of one excluded the other (See middle of page 96).

The case of *Steinlein vs. Halstead*, 52 Wis. 289, involved the validity of an assignment under a statute. The statute enumerated certain requirements. The defendant claimed the assignments were void because the attachment of a certificate, not one of the require-

ments, but which was quite generally used in the practice, had not been made. The Court repudiated this contention by stating that the enumeration of the requirements in the statute excluded all others not enumerated (See middle of page 294). This is a plain application of the rule *expressio unius est exclusio alterius* to a statute.

In the case of *State, ex. rel. Priest vs. Regents of the University of Wisconsin*, 54 Wis. 159, we have the same application of rule to a statute, but the statute is peculiar in that it stated that no student shall be required to pay any tuition fee for one year next succeeding his admission to the university, with certain exceptions. The student wanted to make additional exceptions to the statute, but the Court rejected the idea, stating that the enumeration of certain exceptions in the Statute excluded all other exceptions, and applied the rule, which we are here discussing (See bottom of page 164).

We have an interesting case in *Towsley vs. Ozaukee County*, 60 Wis. 251. The statute enumerated certain officers to whom the County Board was required to furnish fuel and stationery. The plaintiff was a County Surveyor, and surveyors were not named in that statute. The County has given the plaintiff an office in the Court House, but refused him fuel and stationery. The Court sustained this refusal on the ground that the plaintiff was not among those named in the said statute; and applied the rule we are discussing,—that the naming of certain officers amounted to the exclusion of others. This is a simple case, but it shows how far the rule has been extended when applied to the construction of statutes.

In the case of *Wisconsin Telephone Co. vs. City of Oshkosh*, 62 Wis. 32, we have a construction of a city charter. The city charter of Oshkosh did not mention telephone or telegraph companies among those to whom franchises or licenses could be issued and the Court held, for that reason, that the city had no power to license them, and applied the rule, with the following language:

“The charter having thus expressly stated what the common council might license, without naming telegraphs or telephones, has, by necessary implication, prohibited the exaction of such license of either of those companies. *Expressio unius est exclusio alterius.*”

In the case of *Farrall vs. Shea*, 66 Wis. 561, we have a well-known case involving the statute on survival of actions. A quotation from the middle of page 565 will tell the whole story:

“When the legislature provided that actions for the recovery of *personal* property should survive, it would have been easy and highly proper to have added “or *real* property,” so as to read “for the recovery of *personal* or *real* property.”

ery of personal or *real* property." *Expressio unius est exclusio alterius*. They must have intentionally omitted *real* property."

There is a strict application of the rule in the case of *State ex rel Terry vs. Keaough*, 68 Wis. 135. This was litigation over saloon license fees,—the fee to be \$200.00 if there was a village containing more than five hundred inhabitants within the boundaries of the town. If there was no such village the applicant should have the license for \$100.00. The statute specifically stated that the population was to be ascertained by the last preceding enumeration by the state or general government. The defendant offered to prove by actual count, that there was such an incorporated village. The Court applied the rule and said the method prescribed by the legislature was exclusive (See middle of page 142).

In the case of *Eliot vs. Eliot*, 81 Wis. 295, we have a very strict application of the rule. The plaintiff sought annulment of marriage under the annulment statute, on the ground of non-age. The defense set up that he had fraudulently misrepresented his age. The Court rejected this defense by stating that the statute imposes no other or further restrictions upon the right of action than those enumerated in the statute, and said:

"It is fair to assume that, had the legislature intended other restrictions upon the right of action, it would have expressed the same in the statute. *Expressio unius est exclusio alterius*."

This last case has been followed in *Swenson vs. Swenson*, 179 Wis. 536.

In the case of *J. I. Case Plow Works vs. Niles & Scott Co.*, 90 Wis. 590, we have the application of the rule to private contracts where the plaintiff undertook to bring in certain implied warranties. The Court denied this contention and used the following unmistakable language, in the middle of page 604:

"The contract as written must be taken as the final and conclusive evidence of all that was intended or agreed upon. The familiar rule, '*Expressio unius est exclusio alterius*' clearly applies."

We cite this case only for the purpose of showing that the rule has been carried into the private contract field.

In *Allen vs. Clausen*, 114 Wis. 244, we have a well-known case where the Court applied the rule to old Section 1862, being the statute covering the granting of street-car franchises (that statute is now number (193.01) ; which from an early day has had in it a clause which gives an authorization to municipal corporations to grant street-car franchises to *corporations organized under Chapter 180*. The Court

applied the rule and said a franchise could not be granted to anybody else, because the naming of one amounted to the exclusion of all others (See top of page 251).

In the case of *Chain Belt Co. vs. Milwaukee*, 151 Wis. 188, the Court applied the rule without quoting it in latin form. The charter of Milwaukee was involved, the city contending for the right to license elevators and elevator operators, but such elevators were not named in the licensing chapter, and the Court ruled as follows:

“The enumeration of subjects which may be regulated by license also tends somewhat to indicate a legislative intention that the city should not exercise that power over other subjects. This Court cannot grant that power to the city. If the legislature has not in some way given the city that power the city does not possess it.”

(See middle of page 193.)

We cite the case of *Schlag vs. Chicago, M. & St. P. Co.*, 152 Wis. 165, to show that the rule has been extended to the grounds for new trial. There was a contest over a new trial and over the awarding of costs.

“The lower court has not left us in the dark as to its reasons for making the order. It has stated them certainly, definitely, and affirmatively, and the maxim *Expressio unius est exclusio alterius* should be applied when we are considering the decision.”

In the case of *Meade vs. Dane County*, 155 Wis. 632, the rule was applied to the powers of counties. The constitution vested certain powers in the County Board and there was an attempt by statute to grant a referendum to the electors. The Court decided that this part of the statute was void because the delegation of these powers in the constitution to the County Board excluded the idea that they could be extended to any one else. (See bottom of page 643.)

It was expressly held in *State ex rel Owens vs. Donald*, 160 Wis. 21, that what appears to be a grant may be a limitation under this rule. This case, again, is very important, because it deals with a constitution where lawyers are inclined to look for prohibitions, since the state is a sovereign; but nevertheless the rule is applied in very plain language. See top of page 134 where the following appears:

“The power to tax is not retained by the people to be exercised by the legislature for all purposes not mentioned. Not by any means. Where the constitution deals with the matter, it deals exclusively. That is the rule. The language, in form, conferring the power to tax for a class of things ‘expenses of the state for each year,’ though in form in words of grant, is in fact a limitation. *Expressio unius exclusio alterius*.”

In the case of *State ex rel Owen vs. Reisen*, 164 Wis. 126, the rule was applied but not quoted. That case involved the jurisdiction of the County Court of Iowa County. The statute enumerated many things to be within the jurisdiction of that Court, but did not mention the power to abate a public nuisance. A case to abate a public nuisance was transferred to the County Court by change of venue, and the defense was made that the Court had no jurisdiction of the subject matter. The Court accepted the proposition as follows:

"The particular specification of jurisdiction conferred in certain cases excludes the idea that the legislature intended to confer jurisdiction in other cases. An action to abate a nuisance does not fall within any of the classes specified in the statute. If the legislature intended to confer general jurisdiction upon the county court of Iowa county in all cases where the amount involved did not exceed \$25,000, it was easy to say so."

In this case the statute expressly granted jurisdiction to the court over certain things and that was held to exclude all other things.

The rule was applied and quoted in the case of *State ex rel Kleist vs. Donald*, 164 Wis. 545. The contention was made in that case that a certain circuit judge had been removed from office because his term had been shortened. The Court met the contention by stating that the constitution prescribes a particular method by which a circuit judge may be removed, and the expression of this one method excluded the contention of the plaintiff, and quoted the rule of construction heretofore stated (see middle of page 551).